

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL RIOS HINOJOSA,
TDCJ No. 2034194,

Petitioner,

V.

DIRECTOR, TDCJ-CID,

Respondent.

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No. 3:18-cv-3113-G-BN

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

Petitioner Daniel Rios Hinojosa, a Texas prisoner, “was convicted of the offense of ‘Continuous Sexual Abuse of Young Child’ and sentenced to 75 years in prison.” *Hinojosa v. State*, No. 10-15-00388-CR, 2016 WL 7077831, at *1 (Tex. App. – Waco Nov. 30, 2016, pet ref’d) (citing TEX. PENAL CODE ANN. § 21.02 (West 2011) and asserting as errors, which he did not preserve, that “the sentence is grossly disproportionate to the crime and inappropriate as applied to him”), *aff’g State v. Hinojosa*, No. 39522CR (40th Dist. Ct., Ellis Cnty., Tex.).

After the Texas Court of Criminal Appeals (the CCA) refused Hinojosa’s petition for discretionary review, *see Hinojosa v. State*, PD-1428-16 (Tex. Crim. App. March 29, 2017), he then filed a state habeas application challenging the constitutionality of Texas Code of Criminal Procedure article 38.37 and asserting that his trial and appellate counsel provided ineffective assistance of counsel (IAC) and that the State committed prosecutorial misconduct, an application that the CCA denied without written order on the findings of the trial court without a hearing, *see*

Ex parte Hinojosa, WR-88,352-01 (Tex. Crim. App. Sept. 12, 2018); *see also* Dkt. No. 25-45 at 6-14 (trial court’s findings of fact and conclusions of law).

Hinojosa now asserts through a timely *pro se* application for a writ of habeas corpus under 28 U.S.C. § 2254, which he then supplemented, that the CCA unreasonable adjudicated multiple IAC claims [Claims 1, 2, 3, 4, & 6] and his claim of prosecutorial misconduct [Claim 5]. *See* Dkt. No. 17.

The State responded. *See* Dkt. No. 23. Hinojosa replied. *See* Dkt. No. 31. And Senior United States District Judge A. Joe Fish has referred Hinojosa’s Section 2254 application to the undersigned United States magistrate judge for pretrial management.

The undersigned now enters these findings of fact, conclusions of law, and recommendation that the Court should deny federal habeas relief.

Legal Standards

“Federal habeas features an intricate procedural blend of statutory and caselaw authority.” *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019). In the district court, this process begins – and often ends – with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), under which “state prisoners face strict procedural requirements and a high standard of review.” *Adekeye*, 938 F.3d at 682 (citation omitted). This is because, “[u]nder AEDPA, state courts play the leading role in assessing challenges to state sentences based on federal law.” *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020) (per curiam).

So, where a state court has already rejected a claim on the merits, a federal

court may grant habeas relief on that claim only if the state court adjudication

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The statute therefore “restricts the power of federal courts to grant writs of habeas corpus based on claims that were ‘adjudicated on the merits’ by a state court,” *Shinn*, 141 S. Ct. at 520 (citation omitted). And, “[w]hen a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court’s decision unless its error lies ‘beyond any possibility for fairminded disagreement.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Further, “[u]nder § 2254(d),” the reasonableness of the state court decision – not whether it is correct – “is ‘the only question that matters.’” *Id.* at 526 (quoting *Richter*, 562 U.S. at 102); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question under AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable – a substantially higher threshold.”); *Sanchez v. Davis*, 936 F.3d 300, 305 (5th Cir. 2019) (“[T]his is habeas, not a direct appeal, so our focus is narrowed. We ask not whether the state court denial of relief was incorrect, but whether it was unreasonable – whether its decision was ‘so lacking in justification’ as to remove ‘any possibility for fairminded disagreement.’” (citation omitted)).

A state court adjudication on direct appeal is due the same deference under Section 2254(d) as an adjudication in a state post-conviction proceeding. *See, e.g., Dowthitt v. Johnson*, 230 F.3d 733, 756-57 (5th Cir. 2000) (a finding made by the CCA on direct appeal was an “issue ... adjudicated on the merits in state proceedings,” to be “examine[d] ... with the deference demanded by AEDPA” under “28 U.S.C. § 2254(d)”). And nothing “in AEDPA or [the Supreme] Court’s precedents permit[s] reduced deference to merits decisions of lower state courts.” *Shinn*, 141 S. Ct. at 524 n.2 (citing 28 U.S.C. § 2254).

Starting with Section 2254(d)(1), a state court decision is “contrary” to clearly established federal law if “it relies on legal rules that directly conflict with prior holdings of the Supreme Court or if it reaches a different conclusion than the Supreme Court on materially indistinguishable facts.” *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004); *see also Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam) (“We have emphasized, time and time again, that the [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is ‘clearly established.’” (citation omitted)).

“A state court unreasonably applies clearly established Supreme Court precedent when it improperly identifies the governing legal principle, unreasonably extends (or refuses to extend) a legal principle to a new context, or when it gets the principle right but ‘applies it unreasonably to the facts of a particular prisoner’s case.’” *Will v. Lumpkin*, 978 F.3d 933, 940 (5th Cir. 2020) (quoting *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000); citation omitted). “But the Supreme Court has only

clearly established precedent if it has ‘broken sufficient legal ground to establish an asked-for constitutional principle.’” *Id.* (quoting *Taylor*, 569 U.S. at 380-82; citations omitted).

As noted above, “[f]or purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law.... A state court’s determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court’s decision.” *Richter*, 562 U.S. at 101 (citations and internal quotation marks omitted). “Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.” *Id.* at 102 (internal quotation marks omitted); *see also Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) (recognizing that Section 2254(d) tasks courts “with considering not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it could have relied upon” (citation omitted)).

The Supreme Court has further explained that “[e]valuating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Richter*, 562 U.S. at 101 (internal quotation marks omitted). And “even a strong case for relief does not mean the state court’s contrary conclusion was

unreasonable.” *Id.* at 102. The Supreme Court has explained that, “[i]f this standard is difficult to meet, that is because it was meant to be,” where, “[a]s amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings,” but “[i]t preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents,” and “[i]t goes no further.” *Id.* Thus, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 103; *accord Burt v. Titlow*, 571 U.S. 12, 20 (2013) (“If this standard is difficult to meet – and it is – that is because it was meant to be. We will not lightly conclude that a State’s criminal justice system has experienced the extreme malfunction for which federal habeas relief is the remedy.” (internal quotation marks, brackets, and citations omitted)).

As to Section 2254(d)(2)’s requirement that a petitioner show that the state court adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” the Supreme Court has explained that “a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance” and that federal habeas relief is precluded even where the state court’s factual determination is debatable.

Wood v. Allen, 558 U.S. 290, 301, 303 (2010). Under this standard, “it is not enough to show that a state court’s decision was incorrect or erroneous. Rather, a petitioner must show that the decision was objectively unreasonable, a substantially higher threshold requiring the petitioner to show that a reasonable factfinder must conclude that the state court’s determination of the facts was unreasonable.” *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012) (brackets and internal quotation marks omitted).

The Court must presume that a state court’s factual determinations are correct and can find those factual findings unreasonable only where the petitioner “rebut[s] the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001).

This presumption applies not only to explicit findings of fact but also “to those unarticulated findings which are necessary to the state court’s conclusions of mixed law and fact.” *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001); *see also Ford v. Davis*, 910 F.3d 232, 235 (5th Cir. 2018) (Section 2254(e)(1) “‘deference extends not only to express findings of fact, but to the implicit findings of the state court.’ As long as there is ‘some indication of the legal basis for the state court’s denial of relief,’ the district court may infer the state court’s factual findings even if they were not expressly made.” (footnotes omitted)).

And, even if the state court errs in its factual findings, mere error is not enough – the state court’s decision must be “*based* on an unreasonable factual determination.... In other words, even if the [state court] had gotten [the disputed] factual determination right, its conclusion wouldn’t have changed.” *Will*, 978 F.3d at

942. Further, “determining whether a state court’s decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court’s reasoning.” *Richter*, 562 U.S. at 98; *see also Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003) (“a federal habeas court is authorized by Section 2254(d) to review only a state court’s ‘decision,’ and not the written opinion explaining that decision” (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam))); *Evans*, 875 F.3d at 216 n.4 (even where “[t]he state habeas court’s analysis [is] far from thorough,” a federal court “may not review [that] decision de novo simply because [it finds the state court’s] written opinion ‘unsatisfactory’” (quoting *Neal*, 286 F.3d at 246)).

Section 2254 thus creates a “highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). To overcome this standard, a petitioner must show that “there was no reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98. That is, a petitioner must, in sum, “show, based on the state-court record alone, that any argument or theory the state habeas court could have relied on to deny [him] relief would have either been contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court.” *Evans*, 875 F.3d at 217.

Analysis

I. Hinojosa procedurally defaulted Claims 1 and 6.

The State first asserts that Hinojosa failed to properly exhaust Claims 1 and 6

– IAC claims against his trial counsel based on allegations that counsel failed to object to the introduction of extraneous evidence and failed to raise a timely claim under *Brady v. Maryland*, 373 U.S. 83 (1963) – and thus these unexhausted claims are now procedurally defaulted. The undersigned agrees.

Hinojosa failed to raise either claim on direct appeal, *see Hinojosa*, 2016 WL 7077831; *Hinojosa*, PD-1428-16, or in the state habeas proceeding, *see, e.g.*, Dkt. No. 25-45 at 6-14; *see also Bynum v. State*, 767 S.W.2d 769, 776 (Tex. Crim. App. 1989) (The CCA “will not consider a ground for review that does not implicate a determination by the court of appeals of a point of error presented to that court in an orderly and timely fashion.” (citations omitted)).

So the factual and legal bases of both claims were not “fairly presented to the” CCA, as the highest available state court, for review, meaning that Hinojosa has failed to properly exhaust state court remedies as to them. *Campbell v. Dretke*, 117 F. App’x 946, 957 (5th Cir. 2004) (“The exhaustion requirement is satisfied when the substance of the habeas claim has been fairly presented to the highest state court’ so that a state court has had a ‘fair opportunity to apply controlling legal principles to the facts bearing on the petitioner’s constitutional claim.’” (quoting *Soffar v. Dretke*, 368 F.3d 441, 465 (5th Cir. 2004))); *see* 28 U.S.C. § 2254(b)(1)(A).

Unexhausted claims should be found procedurally barred if “the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.” *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas law precludes successive habeas claims except in narrow circumstances. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 4. This is a codification of the judicially created Texas abuse-of-the-writ doctrine. *See Barrientes v. Johnson*, 221 F.3d 741, 759 n.10 (5th Cir. 2000). Under this state law, a habeas petitioner is procedurally barred from returning to the Texas courts to exhaust his claims unless the petitioner presents a factual or legal basis for a claim that was previously unavailable or shows that, but for a violation of the United States Constitution, no rational juror would have found for the State. *See id.* at 758 n.9. Therefore, unexhausted claims that could not make the showing required by this state law would be considered procedurally barred from review on the merits in this Court unless an exception is shown. *See Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir. 2001).

An exception to this bar allows federal habeas review if a petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. But these claims are procedurally barred, because Hinojosa has not shown that the claim would be allowed in a subsequent habeas proceeding in state court under Texas law. Nor has he asserted the “fundamental miscarriage of justice” exception to procedural bar.

The Court should therefore deny Claims 1 and 6 as procedurally barred.

II. Hinojosa’s remaining IAC claims [Claims 2, 3, and 4] should be denied.

The Court reviews the merits of properly exhausted IAC claims, whether asserted against either trial or appellate counsel, under the two-prong test

established in *Strickland v. Washington*, 466 U.S. 668 (1984), under which a petitioner “must show that counsel’s performance” – “strongly presume[d to be] good enough” – “was [1] objectively unreasonable and [2] prejudiced him.” *Coleman v. Vannoy*, 963 F.3d 429, 432 (5th Cir. 2020) (quoting *Howard v. Davis*, 959 F.3d 168, 171 (5th Cir. 2020)).

To count as objectively unreasonable, counsel’s error must be “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687; *see also Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (reaffirming that “[i]t is only when the lawyer’s errors were ‘so serious that counsel was not functioning as the “counsel” guaranteed ... by the Sixth Amendment’ that *Strickland*’s first prong is satisfied” (citation omitted)). “And to establish prejudice, a defendant must show ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 694).

“A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.” *Cotton v. Cockrell*, 343 F.3d 746, 752-53 (5th Cir. 2003); *see also Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012) (“[B]ecause of the risk that hindsight bias will cloud a court’s review of counsel’s trial strategy, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant

must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (quoting *Strickland*, 466 U.S. at 689)).

And, “[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” *Richter*, 562 U.S. at 110. “The Supreme Court has admonished courts reviewing a state court’s denial of habeas relief under AEDPA that they are required not simply to give [the] attorney’s the benefit of the doubt, ... but to affirmatively entertain the range of possible reasons [petitioner’s] counsel may have had for proceeding as they did.” *Clark v. Thaler*, 673 F.3d 410, 421 (5th Cir. 2012) (internal quotation marks omitted).

Therefore, on habeas review under AEDPA, “if there is any ‘reasonable argument that counsel satisfied *Strickland*’s deferential standard,’ the state court’s denial must be upheld.” *Rhoades v. Davis*, 852 F.3d 422, 432 (5th Cir. 2017) (quoting *Richter*, 562 U.S. at 105); *see also Sanchez*, 936 F.3d at 305 (“As the State rightly puts it, we defer ‘both to trial counsel’s reasoned performance and then again to the state habeas court’s assessment of that performance.’” (quoting *Rhoades*, 852 F.3d at 434)).

To demonstrate prejudice, a habeas petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, “the question is not whether a court can be certain counsel’s performance had no effect

on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently.” *Richter*, 562 U.S. at 111. “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different,” which “does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.” *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 696, 697). “The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112.

IAC claims are considered mixed questions of law and fact and are therefore analyzed under the “unreasonable application” standard of 28 U.S.C. § 2254(d)(1). *See Gregory v. Thaler*, 601 F.3d 347, 351 (5th Cir. 2010); *Adekeye*, 938 F.3d at 682.

Where the state court has adjudicated claims of ineffective assistance on the merits, this Court must review a habeas petitioner’s claims under the “doubly deferential” standards of both *Strickland* and Section 2254(d). *Cullen v. Pinholster*, 563 U.S. 170, 190, 202 (2011); *compare Rhoades*, 852 F.3d at 434 (“Our federal habeas review of a state court’s denial of an ineffective-assistance-of-counsel claim is ‘doubly deferential’ because we take a highly deferential look at counsel’s performance through the deferential lens of § 2254(d).” (citation omitted)), *with Johnson v. Sec’y, DOC*, 643 F.3d 907, 910-11 (11th Cir. 2011) (“Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding.”); *cf. Shinn*, 141 S. Ct. at 525 (“recogniz[ing] the

special importance of the AEDPA framework in cases involving *Strickland* claims,” since “[i]neffective-assistance claims can function ‘as a way to escape rules of waiver and forfeiture,’ and they can drag federal courts into resolving questions of state law” (quoting *Richter*, 562 U.S. at 105)).

In such cases, the “pivotal question” for this Court is not “whether defense counsel’s performance fell below *Strickland*’s standard”; it is “whether the state court’s application of the *Strickland* standard was unreasonable.” *Richter*, 562 U.S. at 101; *see also id.* at 105 (“Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” (internal quotation marks and citations omitted)). “And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citation omitted).

In sum, AEDPA does not permit a *de novo* review of state counsel’s conduct in these claims under *Strickland*. *See Richter*, 562 U.S. at 101-02. Instead, on federal habeas review of a *Strickland* claim fully adjudicated in state court, the state court’s determination is granted “a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Id.* at 101.¹

¹ *See also Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (explaining that federal habeas review of ineffective-assistance-of-counsel claims is “doubly deferential” “because counsel is ‘strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment’”; therefore, “federal courts are to afford ‘both the state court

As against his trial counsel, Hinojosa alleges that his Sixth Amendment right to effective assistance was violated when counsel advised him to turn down all plea offers and by counsel's failure to make objections to testimony that Hinojosa alleges was prejudicial and to alleged prosecutorial misconduct.

The CCA's adjudication of these claims is based on the trial court's findings, made after obtaining affidavits from Hinojosa's trial counsel (his counsel in this matter and his separate counsel in 3 related cases). *See* Dkt. No. 25-44 at 8-14.

Both attorneys testified that they were in regular contact with Hinojosa, including as to plea offers. *See, e.g., id.* at 12-13 ("Each and every time an offer was made on the three (3) cases that I represented Mr. Hinojosa on were made I immediately informed him of the offer and advised of the punishment range if found guilty. In response to telling Mr. Hinojosa about the plea bargain offers I would respond to each of the questions he asked. He was informed of case law that were

and the defense attorney the benefit of the doubt" (quoting *Burt*, 571 U.S. at 22, 15)); *Adekeye*, 938 F.3d at 683-84 ("The Supreme Court standard on prejudice is sharply defined: 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.' [A petitioner] must show it was 'reasonably likely' the jury would have reached a different result, not merely that it could have reached a different result. The Court reaffirmed this point in *Richter*: 'The likelihood of a different result must be substantial, not just conceivable.' Now layer on top of that the habeas lens of reasonableness. [Where] the state court has already adjudicated [a petitioner's] ineffective-assistance claim on the merits, he must show that the court's no-prejudice decision is 'not only incorrect but "objectively unreasonable."' Put differently, [he] must show that every reasonable jurist would conclude that it is reasonable likely that [a petitioner] would have fared better at trial had his counsel conducted [himself differently]. 'It bears repeating,' the Supreme Court emphasized in *Richter*, 'that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'" (footnotes omitted)).

adverse to some of the strategies he wanted to use at trial. The three (3) cases I represented him on were ultimately dismissed after being found guilty in this case and sentenced. However, prior to trial I met with him and Jim Jenkins to answer all of his questions and advised that, based on the evidence, and my experience of try cases like these it would be dangerous with regards to the potential sentence if he was found guilty. Mr. Hinojosa acknowledged each time that he understood the risks, which were significant, but that he wanted to go to trial anyway. The explicit plea bargains made were always conveyed to him along with the same explanation of the evidence and how it would likely play out in trial. Each time Hinojosa indicated he understood but stood strong on rejecting any offer.”).

Mr. Jenkins further testified as to the objections-based IAC claim:

The [state trial court] has Ordered the undersigned to respond to the question of whether or not there was objection to the testimony of Nurse Dunsarias, the [Sexual Abuse Nurse Examiner, or] SANE nurse from Cook Children's Hospital. The objection was made; it was overruled, to the testimony. The SANE nurse, deemed an expert designated by the Court, testified regarding grooming and child sexual abuse psychology and practice, most of which was known to the jury before her testimony and all of which was admissible....

The undersigned does not have a copy of the Reporter's Record regarding the closing argument. However, it is not unusual for the State to argue that the victim is credible. In fact, that is true in most every case, whether the argument is made on behalf of witnesses by the State or the Defense. If no objection was made, it is because the trial attorney believed that the objection would make things worse. Generally, if the jury hears that the Judge overrules an objection, they feel that the objection should not have been made, because jurors generally believe that the Judge is always correct.

Id. at 8-9.

The state court found each of Hinojosa's counsel to be “competent attorneys, experienced in criminal defense”; that trial counsel's affidavits “are consistent with

the records and the Court's own memory and knowledge" and "credible"; and that Hinojosa's "claims that contradict the affidavits of counsel are not credible." Dkt. No. 25-45 at 7; *cf. Pippin v. Dretke*, 434 F.3d 782, 792 (5th Cir. 2005) ("A trial court's credibility determinations made on the basis of conflicting evidence are entitled to a strong presumption of correctness and are 'virtually unreviewable' by the federal courts." (quoting *Moore v. Johnson*, 194 F.3d 586, 605 (5th Cir. 1999))).

The state court then made detailed findings, rejecting these IAC claims. *See* Dkt. No. 25-45 at 8-11. As to the plea-offer claim, the state court made findings consistent with counsel's testimony. The court made similar findings as to the objections claim, also finding that the SANE nurse was qualified to testify, that grooming is a legitimate subject of testimony for which she was qualified, that any objections related to her qualification on this subject would have been futile.

The court then found that the majority of the prosecution's closing was not in error: "The prosecutor's statement 'We believe every single word that came out of [the victim's] mouth' was in error, but it was one isolated statement in the midst of permissible argument and offered to explain a legal question, not to argue the victim's credibility generally. The result of the proceeding would not have been different but for counsel's failure to object to this argument." *Id.* at 10.

Considering these findings, made after obtaining sworn testimony that the state court found to be credible, under the deferential *Strickland* standards applied through the deferential lens of AEDPA, as the Court must, Hinojosa has not shown that the CCA's denial of any claim that his trial counsel's representation violated his

rights under the Sixth Amendment amounts to either “an unreasonable application of *Strickland* or an unreasonable determination of the evidence.” *Garza v. Stephens*, 738 F.3d 669, 680 (5th Cir. 2013) (citing 28 U.S.C. § 2254(d)(1)-(2)); *see also, e.g., Rhodes*, 852 F.3d at 432, 434; *Sanchez*, 936 F.3d at 305.

Hinojosa’s one claim against his appellate counsel is that she failed to raise his arguments as to the constitutionality of Article 38.37, the testimony of the SANE nurse, and the prosecution’s closing. The state court found that counsel was not ineffective because (1) the constitutional claim was not meritorious and (2) the other asserted errors were neither preserved at trial nor in error. *See* Dkt. No. 25-45 at 11-12. Hinojosa also has not shown that the CCA’s rejection of this IAC claim, based on appellate counsel’s failure to raise these claims, is unreasonable.

The Supreme Court “has indicated that although ‘it is still possible to bring a *Strickland* claim based on counsel’s failure to raise a particular claim, ... it is difficult to demonstrate that counsel was incompetent.’” *Diaz v. Quarterman*, 228 F. App’x 417, 427 (5th Cir. 2007) (per curiam) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). And, “[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986); internal quotation marks omitted); *see also Varga v. Quarterman*, 321 F. App’x 390, 396 (5th Cir. 2009) (per curiam) (“In *Gray*, the Seventh Circuit further held that if appellate counsel ‘failed to raise a significant and obvious issue, the failure could be viewed as deficient performance’ and that if the issue that was not raised ‘may have

resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial.” (quoting *Gray*, 800 F.2d at 646)).

The Court should therefore deny Claims 2, 3, and 4.

III. Hinojosa’s prosecutorial misconduct claim [Claim 5] should be denied.

Reframing Claim 4, Hinojosa argues that the prosecution committed misconduct by vouching for the victim’s credibility and calling him names during closing. But a federal court’s review claims of prosecutorial misconduct under Section 2254 is circumscribed. And,

[t]o prevail on a claim of prosecutorial misconduct, a habeas corpus petitioner must show that the prosecutor’s actions “so infected the [trial] with unfairness as to make the resulting [conviction] a denial of due process.” *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Ables v. Scott*, 73 F.3d 591, 592 n. 2 (5th Cir.1996)). “Prosecutorial misconduct is not a ground for relief unless it casts serious doubt upon the correctness of the jury’s verdict.” *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). In other words, the alleged conduct must render the trial fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment. *See Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986).

Batiste v. Quarterman, 622 F. Supp. 2d 423, 435 (S.D. Tex. 2008); *see also Darden*, 477 U.S. at 181 (“[T]he appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.” (quotation marks omitted)).

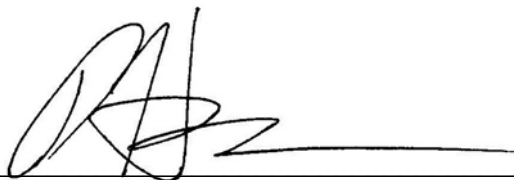
The prosecution’s closing did not amount to a due process violation for the reasons explained by the state court. *See* Dkt. No. 25-45 at 10-11, 13. So it was not unreasonable for the CCA to reject this claim. And this Court should deny Claim 5.

Recommendation

The Court should deny the application for a writ of habeas corpus.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: March 31, 2021

A handwritten signature in black ink, appearing to read 'D. Horan', is written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE